

400 KAR 1:120. Administrative hearings, informal settlement conferences, and general practice provisions relating to a mineral operation.

RELATES TO: KRS 224.10-410, 224.10-470, 350.010(2), 350.032, 350.060, 350.085, 350.130, 350.240, 350.300, 350.305, 350.990

STATUTORY AUTHORITY: KRS 350.028, 350.029, 350.0301, 350.050, 350.240, 350.300

NECESSITY, FUNCTION, AND CONFORMITY: KRS Chapter 350 requires the cabinet to promulgate administrative regulations pertaining to noncoal mineral operations to minimize their adverse effects on the citizens and the environment of the Commonwealth. KRS 350.0301 requires the cabinet to promulgate administrative regulations establishing formal and informal hearing procedures and administrative conferences. This administrative regulation establishes provisions governing requests for administrative hearings, initiation of administrative hearings by the cabinet, informal settlement conferences, procedures for the conduct of administrative hearings, and orders to abate and alleviate.

Section 1. Definitions. (1) "Cessation order" means an order for cessation and immediate compliance and any similar order issued by an authorized representative of the cabinet pursuant to KRS 350.130 and 405 KAR Chapter 5.

(2) "Department" is defined by 405 KAR 5:002.

(3) "Mineral operation" is defined by 405 KAR 5:002.

(4) "Mineral operator" is defined by 405 KAR 5:002.

(5) "Mineral permittee" is defined by 405 KAR 5:002.

(6) "Notice of noncompliance and order for remedial measures" means a written document and order prepared by an authorized representative of the cabinet in accordance with KRS 350.130 that:

(a) Sets forth with specificity the violations of KRS Chapter 350, 405 KAR Chapters 5, or permit conditions, which the authorized representative of the cabinet determines to have occurred based upon a cabinet inspection; and

(b) Establishes the necessary remedial actions, if any, and the time schedule for completion thereof, which the authorized representative deems necessary and appropriate to correct the violations.

(7) "Order for cessation and immediate compliance" means a written document and order issued by an authorized representative of the cabinet in accordance with KRS 350.130 if:

(a) A person to whom a notice of noncompliance and order for remedial measures was issued has failed, as determined by a cabinet inspection, to comply with the terms of the notice of noncompliance and order for remedial measures within the time limits set therein, or as subsequently extended; or

(b) The authorized representative finds, on the basis of a cabinet inspection, any condition or practice or any violation of KRS Chapter 350, 405 KAR Chapters 5, or any condition of a permit that:

1. Creates an imminent danger to the health or safety of the public; or

2. Is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

(8) "Permit" is defined by 405 KAR 5:002.

(9) "Permit area" is defined by 405 KAR 5:002.

(10) "Significant, imminent environmental harm to land, air, or water resources" is defined by 405 KAR 5:002.

Section 2. Review of a Cabinet Order and Final Determination Relating to a Mineral Opera-

tion. (1) Who may file. A person aggrieved by a determination of the cabinet relating to a mineral operation, including a notice of noncompliance and order for remedial measures, cessation order, or penalty assessment, may file a petition for review of the determination. A petition for review shall be filed pursuant to this section and KRS 350.0301(1).

(2) Time for filing.

(a) A person shall file in the office a petition within thirty (30) days after the person has had actual notice of the determination complained of, or could reasonably have had notice.

(b) The hearing officer shall not grant an extension of time for filing a petition for review.

(c) If the hearing officer, upon motion or his own initiative, finds that the person failed to timely file the petition for review in accordance with this section, the hearing officer shall issue a report recommending dismissal of the petition. The secretary shall dismiss a petition that is not filed in accordance with paragraph (a) of this subsection, stating that the person waived his right to an administrative hearing.

(3) Contents of the petition. The petition for review shall contain:

(a) A statement of the facts entitling the person requesting review to administrative relief;

(b) An explanation of each specific alleged error in the cabinet's determination;

(c) A request for specific relief;

(d) A copy of the written determination to be reviewed, if applicable; and

(e) If the petition challenges an order or final determination on a permit, the name of the permittee and the permit number.

(4) Public notice. The office shall post notice of the administrative hearing at the department's regional office with jurisdiction over the mine site, at least five (5) days before the administrative hearing.

(5) Answer or responsive pleading.

(a) The respondent shall file with the office an answer or other responsive pleading within thirty (30) days of service of the petition.

(b) The answer shall contain:

1.a. A statement specifically admitting or denying the facts stated in the petition or amended petition; or

b. If the person is without knowledge or information sufficient to form a belief as to the truth of an allegation, then the person shall so state and it shall have the effect of a denial;

2. Any defense to each claim for relief; and

3. Any other matter to be considered on review.

(c) Failure to plead any available administrative affirmative defense in a required answer or responsive pleading may constitute a waiver of the defense, except that lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted shall not be waived by failure to assert those defenses in an answer or responsive pleading.

(d) An allegation in the petition to which no answer or responsive pleading is required or permitted shall be taken as denied or avoided.

(e) An allegation in the petition to which an answer or responsive pleading is required may be deemed admitted if not denied in the answer or responsive pleading.

(6) Amended petition.

(a) A petition may be amended once as a matter of right prior to the filing of an answer and thereafter by leave of the hearing officer upon proper motion.

(b) The respondent shall have ten (10) days from the filing of an amended petition or the time remaining for filing an answer to the original petition, whichever is longer, to file an answer or responsive pleading to the amended petition.

(c) If the hearing officer grants a motion to amend a petition, the hearing officer shall set the time for an answer to be filed in the order granting the motion.

(7) Effect of filing. The filing of a petition for review shall not stay the effectiveness of the cabinet's determination pending completion of administrative review.

(8) Default.

(a) If the petitioner fails to timely comply with a prehearing order of a hearing officer, the hearing officer may, at his discretion or upon motion issue an order to show cause why the petitioner should not be deemed to have waived the right to an administrative hearing and why the petition should not be dismissed.

(b) If the order to show cause is not satisfied as required, the hearing officer shall recommend to the secretary the entry of a final order dismissing the petition because the petitioner waived the right to an administrative hearing.

(c) If the petitioner fails to appear at an administrative hearing, the petitioner shall be deemed to have waived his right to an administrative hearing and the hearing officer shall recommend to the secretary the entry of a final order dismissing the petition because the petitioner waived the right to an administrative hearing.

(9) Burden of proof.

(a) In review of a penalty assessment, a notice of noncompliance and order for remedial measures, cessation order, or the modification, vacation, or termination thereof under this section:

1. The cabinet shall have the burden of going forward to establish a prima facie case as to the propriety of the penalty assessment, notice of noncompliance and order for remedial measures, cessation order, or modification, vacation, or termination thereof; and

2. The petitioner shall have the ultimate burden of persuasion.

(b) In review of a determination of the cabinet other than those set forth in paragraph (a) of this subsection, the petitioner shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the requested relief.

(10) Hearing officer determination. The hearing officer determination shall be made in accordance with Section 4 of this administrative regulation.

Section 3. Administrative Hearing Initiated by the Cabinet Relating to a Mineral Operation.

(1) Criteria for filing. The cabinet may initiate an administrative hearing if:

(a) The cabinet has reason to believe that a violation of KRS Chapter 350, 405 KAR Chapters 5, or a permit condition has occurred or is occurring;

(b) A mineral permittee has failed to:

1. Pay a civil penalty assessed by the cabinet;

2. Undertake a remedial measure mandated by an order of the cabinet; or

3. Abate a violation the mineral permittee was determined to have committed by an order of the cabinet;

(c) The provisions of 405 KAR 5:082 apply; or

(d) The cabinet has reason to believe an additional remedy should be sought or an order should be entered against a person to protect the environment or the health and safety of the public.

(2) Remedies. In an administrative hearing initiated by the cabinet or in a counterclaim filed in response to a petition filed in accordance with Section 2 of this administrative regulation, the cabinet may seek a combination of the following:

(a) Permit suspension or revocation;

(b) Bond forfeiture;

(c) Civil penalty;

(d) A determination, pursuant to KRS 350.085 and 350.130, that the person shall not be eligible to receive another permit or conduct future mineral operations; or

(e) Any other relief to which the cabinet may be entitled by KRS Chapter 350.

(3) Procedure for an administrative hearing initiated by the cabinet.

(a) Filing of administrative complaint. The cabinet shall initiate an administrative hearing by filing an administrative complaint with the office incorporating the following for each claim for relief:

1. A statement of facts entitling the cabinet to administrative relief;

2. A request for specific relief; and

3. A copy of any notice or order or determination upon which relief is sought.

(b) Public participation. The office shall post notice of the administrative hearing at the department's regional office over the mineral operation, at least five (5) days before the administrative hearing.

(c) Answer or responsive pleading.

1. The respondent shall file with the office an answer or responsive pleading within thirty (30) days of service of the administrative complaint.

2. The answer shall contain:

a.(i) A statement specifically admitting or denying the alleged facts stated in the administrative complaint or amended administrative complaint; or

(ii) If the person is without knowledge or information sufficient to form a belief as to the truth of an allegation, then the person shall so state and it shall have the effect of a denial;

b. Any defense to each claim for relief; and

c. Any other matter to be considered on review.

3. Failure to plead any available administrative affirmative defense in a required answer or responsive pleading may constitute a waiver of the defense, except that lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted shall not be waived by failure to assert them in a responsive pleading.

4. An allegation in a pleading to which an answer or responsive pleading is not required or permitted shall be taken as denied or avoided.

5. An allegation in a pleading to which an answer or responsive pleading is required may be deemed admitted if not denied in the answer or responsive pleading.

(d) Amendment.

1. An administrative complaint may be amended once as a matter of right prior to the filing of an answer and thereafter by leave of the hearing officer upon proper motion.

2. The respondent shall have ten (10) days from the filing of an amended administrative complaint or the time remaining for filing an answer to the original complaint, whichever is longer, to file an answer or responsive pleading to the amended administrative complaint.

3. If the hearing officer grants a motion to amend the administrative complaint, the hearing officer shall set the time for an answer to be filed in the order granting the motion.

(4) Burden of proof.

(a) The cabinet shall have the ultimate burden of persuasion.

(b) A respondent shall have the burden of persuasion to establish an affirmative defense.

(5) Default.

(a) If the person against whom the administrative complaint is filed fails to timely comply with a prehearing order of a hearing officer, the hearing officer may, on his own initiative or upon motion, issue an order to show cause why the person should not be deemed to have waived his right to an administrative hearing and why a report and recommended order adverse to the person shall not be referred to the secretary.

(b) If the order to show cause is not satisfied as required, the hearing officer shall recommend to the secretary the entry of a final order in conformity with the relief requested by the cabinet in its administrative complaint.

(c) If the person against whom the administrative complaint is filed fails to appear at an administrative hearing, the person shall be deemed to have waived his right to a hearing and the hearing officer shall recommend to the secretary the entry of a final order in conformity with the relief requested by the cabinet in its administrative complaint.

(6) Hearing officer determination and report. The hearing officer determination and report shall be made in accordance with Section 4 of this administrative regulation.

Section 4. Hearing Officer Determination. (1) The hearing officer determination and report shall be made in accordance with 400 KAR 1:090, Section 20 and the provisions of this section.

(2) The hearing officer may recommend suspension or revocation of the permit or forfeiture of the bond if the mineral permittee has violated:

- (a) Any provision of KRS Chapter 350;
- (b) 405 KAR Chapter 5;
- (c) A permit condition; or
- (d) A final order, including a failure to pay a civil penalty assessed in a final order of the cabinet.

(3) The hearing officer may recommend, pursuant to KRS 350.085 and 350.130, that a person shall not be eligible to receive another permit or conduct future mineral operations.

(4) If the hearing officer finds a violation exists, the hearing officer may recommend that a person be required to abate, repair, alleviate, or prevent violations of KRS Chapter 350, 405 KAR Chapter 5, or a permit condition.

(5) The hearing officer may in reviewing a permit determination by the cabinet recommend:

- (a) That a permit was issued in violation of applicable statutory and regulatory criteria;
- (b) Suspension or revocation of the permit; or
- (c) A remedial or compliance action be taken by the mineral permittee.

Section 5. Judicial Review, Effect, and Subsequent Proceedings. (1) Judicial review. Judicial review may be taken from a final order of the secretary to the appropriate circuit court of competent jurisdiction in accordance with KRS 350.032 or 350.0305, as applicable.

(2) Effect of final order pending judicial review. The commencement of a proceeding for judicial review of a final order of the secretary shall not operate as a stay of a final order, unless specifically ordered by the court of competent jurisdiction.

(3) Remand from a court.

(a) If a matter is remanded from a court for a further proceeding, and to the extent the court's directive and time limitations will permit, each party shall file with the office, a report recommending a procedure to be followed in order to comply with the court's order.

(b) The hearing officer shall review the report and enter a special order governing the handling of a matter remanded for a further proceeding.

Section 6. Informal Settlement Conference. (1) As an alternative to the administrative hearing established in Section 2 of this administrative regulation, a mineral permittee or other person issued a proposed penalty assessment, notice of noncompliance and order for remedial measures, or a cessation order, may request an informal conference with the Director, Division of Mine Reclamation and Enforcement. The request shall be made by submitting a written request.

(2) The mineral permittee or other person shall request an informal conference within thirty (30) days of the issuance of the notice of noncompliance and order for remedial measures, cessation order, or proposed penalty assessment.

(3) A request for an informal conference shall not toll the time for requesting an administrative hearing pursuant to Section 2 of this administrative regulation.

Section 7. Temporary Relief. (1) Temporary Relief Available. Pending the completion of the investigation and hearing provided for in this administrative regulation, a hearing officer may, subject to review by the secretary, grant temporary relief from a:

(a) Notice of noncompliance and order for remedial measures or a cessation order issued for a mineral operation pursuant to KRS Chapter 350 or 405 KAR Chapter 5; or

(b) A permit or bond release decision of the cabinet.

(2) Temporary Relief Not Available. A hearing officer shall not grant temporary relief for:

(a) The issuance of a permit if the cabinet made a determination to deny a permit in whole or in part; or

(b) The release of a bond if the cabinet made a determination to deny a bond release request.

(3) A hearing officer shall grant or deny temporary relief from a cessation order or bond release decision within five (5) working days of receipt by the office of a temporary relief request, unless waived by the petitioner.

(4) Contents of the Petition. A person shall file a written petition for relief with the office. The petition shall contain:

(a) The permit number;

(b) The name of the mineral permittee;

(c) The date and number of the notice of noncompliance and order for remedial measures or cessation order from which relief is requested, if applicable;

(d) The name and telephone number of the petitioner;

(e) A detailed statement setting forth reasons why the relief should be granted;

(f) Facts supporting a substantial likelihood that the person requesting the relief will prevail on the merits of the final determination of the proceeding;

(g) A statement that the relief sought will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources;

(h) If the petition relates to a cessation order, a statement of whether or not the person waives the requirement for the hearing officer to grant or deny the request for temporary relief within five (5) working days of receipt of the petition by the office; and

(i) A statement of the specific relief requested.

(5) Hearing Process.

(a) In addition to the service requirements of 400 KAR 1:090, Section 5, the petitioner shall serve other parties with a copy of the petition simultaneously with the filing of the petition in the office. If service is accomplished by mail, the petitioner shall inform the other parties by telephone at the time of mailing that a petition is being filed in the office and the contents of the petition.

(b) Filing an Objection.

1. The representative of the cabinet and any other party may communicate an objection to the petition to the hearing officer and the petitioner by telephone.

2. The representative of the cabinet and any other party may simultaneously reduce any objection to writing.

3. A written objection shall be immediately filed with the office and immediately served upon the petitioner.

4. Ex parte communication as to the merits of the proceeding shall not be conducted with the hearing officer.

(c) Scheduling a Hearing.

1. Upon receiving an objection to the petition, the hearing officer shall immediately order a location, time, and date for the administrative hearing by communicating the information to the cabinet, any other party, and the petitioner by telephone.

2. The hearing officer shall reduce the communication to writing in the form of a memorandum to the file.

3. The administrative hearing on the request for temporary relief shall be held in a location acceptable to both the cabinet and the petitioner.

4. If the petitioner did not waive the requirement for the hearing officer to grant or deny temporary relief within five (5) working days of the office's receipt of the petition for temporary relief as set forth in subsections (3) and (4)(h) of this section, the hearing officer shall schedule the administrative hearing within (5) five days of the office's receipt of the petition for temporary relief.

(d) If an evidentiary hearing is held, the hearing officer may require each party to submit proposed findings of fact and conclusions of law to be considered at the evidentiary hearing, which may be orally supplemented on the record at the hearing.

(e) If at any time, the petitioner requests a delay or acts in a manner so as to frustrate the expeditious nature of the proceeding or fails to supply the information required by the hearing officer, the action shall constitute a waiver of the five (5) day requirement in subsection (3) of this section.

(6) Standard of review. A hearing officer may grant temporary relief if:

(a) The person requesting relief shows that there is substantial likelihood that the findings on the merits in an administrative hearing conducted by the cabinet will be favorable to the person; and

(b) The relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources.

(7) Timing of hearing officer's determination.

(a) If the petitioner did not waive the requirement for a hearing officer to grant or deny the request for temporary relief of a cessation order or bond release decision within five (5) days of the office's receipt of the petition as required in subsections (3) and (4)(h) of this section, the hearing officer shall either:

1. Orally rule on the request for temporary relief at the conclusion of the hearing stating the reasons for the decision and issue a written decision stating the reasons for the finding within three (3) working days; or

2. Within twenty-four (24) hours of completion of the administrative hearing, issue a written decision stating the reasons for the finding.

(b) If the petitioner waived the requirement for a hearing officer to grant or deny the request for temporary relief of a cessation order or bond release decision within five (5) days of the office's receipt of the petition in accordance with subsection (3) and (4)(h) of this section or the petitioner did not request temporary relief from a cessation order or a bond release decision, then the hearing officer shall either:

1. Orally rule on the request for temporary relief at the conclusion of the hearing stating the reasons for the decision and issue a written decision stating the reasons for the finding within twenty (20) working days; or

2. Within fifteen (15) days of completion of the administrative hearing issue a written decision stating the reasons for the finding. (21 Ky.R. 773; Am. 1141; eff. 2-22-1995; 38 Ky.R. 666; 994; 1304; 2-3-201; 43 Ky.R. 1869; 44 Ky.R. 74; eff. 8-4-2017; Recodified from 405 KAR 5:095; eff. 8-4-2017.)